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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. [redacted] 61

C. MURRAY HENDERSON, Warden,
Tennessee State Penitentiary,
Petitioner,

vs.

GEORGE MONROE PRYOR.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1115.

C. MURRAY HENDERSON, Warden,
Tennessee State Penitentiary,
Petitioner,

vs.

GEORGE MONROE PRYOR.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioner, C. Murray Henderson, Warden, Tennessee State Penitentiary, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on November 7, 1968.

OPINIONS BELOW.

The Opinion of the United States District Court for the Western District of Tennessee on October 3, 1967 (App., p. 8) is not officially reported. The Opinion of the Court of Appeals on November 7, 1968 (App., p. 17), is not yet officially reported.

JURISDICTION.

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 7, 1968 (App., p. 17). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

Whether or not a defendant's constitutional rights are violated by the admission into evidence of a post-indictment incriminating statement made to a police officer, known to be such by the defendant, in a casual meeting, while the defendant was out of custody, where he had previously been advised by police officers several days before that he was not required to make a statement and he had declined to do so at that time.

STATEMENT.

George Monroe Pryor, a 28 year old male who had attended high school, was arrested in Memphis, Tennessee by the city police on January 18, 1964 and charged with rape of an eleven year old female. He was taken to the police station, where he was booked on a charge of criminal assault and confined in the city jail. The next day a city police officer advised him that any statement that he might make could be used against him in court and asked whether he desired to make one. He declined to do so and no attempt at interrogation was made. On the following day he was taken before a city judge acting as a committing magistrate. The judge advised him of the charge, determined the existence of probable cause from the testimony of a police officer, set bail, and bound him over for action by the grand jury. Four days later, he was indicted for rape.

On the day following his indictment, a city detective went to the apartment of petitioner's paramour, where the

offense was alleged to have been committed, for the purpose of taking some photographs for use in the prosecution. As the detective was leaving, Pryor entered the apartment to visit his paramour and their child. Pryor knew the detective (described by him as a friend-acquaintance) knew that he was a city detective and assumed that he was there to investigate the offense. A casual conversation ensued between Pryor and the detective in the presence of Pryor's paramour, and in the course of the discussion the detective asked, "George, what happened?" Pryor replied with an incriminating statement.

The District Court granted a Petition for Habeas Corpus and directed that Pryor be discharged from custody within fifteen days unless the State decided to retry him (App., p. 8).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit from the Opinion and Order filed in the District Court on October 3, 1967. On November 7, 1968, the United States Court of Appeals for the Sixth Circuit affirmed the Opinion and Order of the District Court (App., p. 17).

REASONS FOR GRANTING WRIT.

The Writ of Certiorari should be granted to insure the uniform administration of justice in the admission of post-indictment statements to prevent defendant's Sixth Amendment rights from being violated. The Court of Appeals affirmed the judgment of the District Court on the basis that the facts in the instant case came within the purview of the majority opinion in **Massiah v. United States**, 377 U. S. 201 (1964).

It is the position and contention of the Petitioner that **Massiah** is restricted to a post-indictment statement obtained under circumstances as were present there. In particular, the Petitioner relies on this language in the majority opinion:

"All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial" (**Massiah v. United States**, 377 U. S. 201, 207).

It is submitted by the Petitioner that at the time the statement involved was made by Pryor to the detective, the detective did not seek out Pryor for a statement, Pryor knew the detective Marshall was a police officer and was investigating the case and the statement was made in the course of a casual conversation with the officer and with another present.

There is nothing secret in the obtaining of the statement; no trickery or deceit was involved and no surreptitious method was used in the obtaining of a statement that was clearly voluntary on the part of Pryor.

Further, in the instant case, there was no purposeful post-indictment interrogation of an unrepresented defendant who had not been advised of his right to counsel and had not waived that right as in **Lyles v. Beto**, 379 U. S. 648 (1965).

We respectfully submit other courts have held that the rule in **Massiah** is limited to the facts appearing in that case. In **U. S. v. Smith** (7 C. C. A., 1967), 379 F. 2d 628, at page 633, the Court stated:

"Massiah did not determine, as Smith claims, that post-indictment statement elicited out of presence of a defendant's attorney rendered those statements ipso facto constitutionally inadmissible. There a co-defendant cooperated with officers and by means of hidden devices surreptitiously elicited incriminating statements by Massiah for hidden officers. The Court's decision was limited to the 'circumstances here disclosed'."

Again, in **U. S. v. Garcia** (2 C. C. A., 1967), 377 F. 2d 321, at page 327, the Court stated:

> "Massiah was thus not aimed at all post-indictment evidence gathered by the prosecution, but at the narrow situation where, after indictment, law enforcement authorities have 'deliberately elicited' incriminating statements from Defendants by direct interrogation or by surreptitious means. The rule does not apply to spontaneous or voluntary statements made by defendant in the presence of government agents."

In this case, Pryor was aware of the fact that he did not have to make a statement, having been advised by a police officer on the day after his arrest that any statement that he might make could be used against him in Court, and he declined at that time to make such statement. The Court of Appeals did not base its opinion on any proposition that there was any pressure, or force or intimidation or stratagem employed to induce the statement made by Pryor to the detective and to hold that the statement voluntarily made by Pryor to the detective comes within the scope of **Massiah** rule would be to say that any post-indictment statement made, out of custody, whatever the circumstances of such statement, is within the scope of Massiah and therefore inadmissible. This, we contend, is not the intention of the Court in **Massiah.**

CONCLUSION.

In conclusion, we earnestly submit that the facts of the post-indictment statement made by Pryor to Lt. Marshall do not come within the scope of **Massiah v. United States,** 377 U. S. 201, requiring the exclusion of such statement in evidence as being in violation of the constitutional rights of Pryor, this is true because in **Massiah** there was the element of secrecy, deliberate eliciting of the state-

ment from a defendant at a time when he was unaware that such statement was being made to government agents and, in this case, Pryor was fully aware of what he was saying, that he did not have to make a statement and that the person to whom the statement was made was a police officer. It is further true because the police officer did not deliberately elicit the statement from Pryor.

Because of the important question of basic individual rights, this Petition for Certiorari should be granted.

Respectfully submitted,

EDWARD P. A. SMITH,
150 East Court Avenue,
Memphis, Tennessee 38103.

JAMES M. THARPE,
1808 Exchange Building,
Memphis, Tennessee 38103.

Certificate of Service.

I, Edward P. A. Smith, one of the attorneys for the Petitioner in the above styled cause, hereby certify that on this day I served true and correct copies of petition for writ of certiorari on G. Edward Draper, Esquire, attorney for the Respondent, by personally delivering same to him at his office at Suite 1030, 100 North Main Building, Memphis, Tennessee 38103.

This 3rd day of February, 1969.

.....

Edward P. A. Smith,
150 East Court Avenue,
Memphis, Tennessee 38103,
Attorney for Petitioner.

APPENDIX.

APPENDIX "A".

OPINION AND ORDER.

Filed October 3, 1967.

In the United States District Court
For the Western District of Tennessee,
Western Division.

George Monroe Pryor,
Petitioner,

vs.

C. Murray Henderson, Warden,
Tennessee State Penitentiary,
Respondent.

Civil Action.
No. C-67-205.

Opinion and Order.

Petitioner, George Monroe Pryor, a prisoner of the State of Tennessee, has filed a petition for writ of habeas corpus and for his discharge from custody on the ground that his Federal constitutional rights were violated during the course of his State criminal trial. The Respondent, who is the warden of the penitentiary, has answered, a writ was issued requiring the presence of petitioner in court, and a hearing has been held at which petitioner and others testified. Moreover, a complete transcript of the State trial has been filed.

To clearly present the issues it is necessary to relate the background facts and in chronological order.

Petitioner, a Negro, who was twenty-eight years old, had attended high school, and had worked as a waiter and funeral director, was arrested in Memphis by the city

police at about 8 P. M. on January 18, 1964, on a charge of rape of an eleven-year-old Negro female, Dorothy Mae Miller, earlier that day. Immediately after his arrest, he was taken in a squad car to a point near which the crime was alleged to have been committed. One of the arresting officers, Robinson, after warning petitioner that he did not have to make a statement, elicited from him an incriminating statement.[1]

At 9 P. M. petitioner was taken to the police station, booked on a charge of criminal assault, and placed in the city jail. The next day, January 19th, at about 12:15 P. M., Turner, a Negro city police officer, sought to interview petitioner. Turner advised petitioner that any statement he might make could be used against him in court and asked whether he desired to make one. Petitioner declined to make a statement.

The following day, Monday, January 20th, petitioner was taken before a city judge acting as a committing magistrate. He was advised by the judge of the charge, the judge determined that there was probable cause from testimony of an officer, and the judge bound over petitioner to the State for action by the grand jury, fixing the bond at $1500. The judge did not call upon petitioner to plead, simply entering a "not guilty" plea for him; this was the practice in all felony cases. There was no provision for appointment of counsel at this stage and no

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[1] At the State trial, counsel for petitioner, after the officer testified as to this statement, objected to it, and a hearing was held out of the presence of the jury (Tr. pp. 114-121). The trial judge indicated that he was going to rule the testimony to be inadmissible under **Escobedo v. Illinois**, 378 U. S. 478 (1964) and that he would so instruct the jury, whereupon counsel for the State agreed that this be done. The jury returned and was given careful and proper instructions to the effect that it should not consider this testimony for any purpose. Petitioner contends, nevertheless, that there was constitutional error and that it was not cured.

inquiry was made with respect to counsel.[2] Petitioner was released on bond later that day.

He was indicted for rape (T. C. A. 39-3701-02) on Friday, January 24th.

On Saturday, January 25th, Lt. Marshall, a Negro detective on the city police force, went to the apartment of petitioner's paramour, Fannie May Whatley, where the crime was alleged to have been committed, to make some photographs. As Marshall was leaving, petitioner appeared, his purpose being to visit Fannie May and their baby. Petitioner knew Marshall (described by petitioner as a friend-acquaintance), knew that he was a city detective, and assumed he was there for investigation. A casual conversation then ensued between petitioner and Marshall, with Fannie May present, in the course of which Marshall asked: "George, what happened?" Petitioner replied, according to Marshall, with an incriminating statement (Tr. pp. 142, 161).[3]

Thereafter, the case was set for trial on December 9, 1964. It appears, however, that, though technically a setting, the real purpose of such "first settings" is to determine whether defendants have a lawyer, to appoint lawyers (i. e. public defenders) if entitled to counsel, to determine whether cases would actually be tried, and to give them a date for trial if trial is indicated. On this

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[2] However, petitioner does not contend that this hearing in the city court was a "critical stage," particularly in view of the fact that the grand jury was in continuous session. This view is correct. See **Kimbro v. Heer, Warden,** 364 F. 2d 116 (6th Cir. 1966), reversed on other grounds 386 U. S. 128 (1967).

[3] Petitioner's counsel anticipated this testimony and objected thereto, and a hearing was held out of the presence of the jury (Tr. pp. 140-158). Petitioner's counsel relied principally on **Messiah v. United States,** 377 U. S. 201 (1964). The trial judge for some reason thought the question was controlled by **Wong Sun v. United States,** 371 U. S. 471 (1963) and ruled this testimony to be admissible. As will be seen, this is the only issue necessary to be decided.

occasion, petitioner appeared, and it developed that he had no lawyer or funds to employ one. At that time, it was the policy not to appoint lawyers, except in unusual circumstances, for defendants who were at liberty on bond.[4]

The prosecutor thereupon moved that the bond be raised (not only because he thought the bond too low but also because this would enable the judge to appoint counsel), the bond was raised to $10,000, and counsel was appointed for petitioner. At this time, the prosecutor realized that the indictment should have been laid under the statute making it a crime to have carnal knowledge of a female under twelve years of age (T. C. A. 39-3705), since under that provision force need not be shown. Accordingly, a second indictment was obtained on December 29, 1964, and the first indictment was later dismissed.

On January 4, 1965, petitioner was arraigned under this second indictment, pleaded not guilty, and on April 5-7, 1965, the trial took place, with two attorneys of the Public Defender's office representing him. The jury found defendant guilty and fixed the punishment at imprisonment for life.[5]

A motion for new trial was denied, and on appeal both of the questions heretofore alluded to were raised, but the conviction was affirmed. **Pryor v. State**, ... Tenn. ..., 400 S. W. 2d 700 (1966). Petitioner, having exhausted his state remedies, then filed this petition.

With respect to the first statement by petitioner heretofore referred to, the one made immediately after arrest

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[4] However, Memphis and Shelby County have one of the oldest and most effective Public Defender systems in the United States.

[5] The jury could have imposed the death penalty. T. C. A. 39-3705. Though the penalty is "life" imprisonment, it is possible for petitioner to be paroled in approximately thirteen and one-half years. T. C. A. 40-3613, 41-332, and 41-334.

in the squad car to Robinson, it was the view of the Tennessee Supreme Court that the error was harmless because (1) the trial court carefully instructed the jury to disregard it and (2) it was only one of two similar incriminating statements, the other of which, that Court held, was properly admitted. It is not necessary for us to consider whether this was constitutional error, and if so, whether it was harmless error because, as will be seen, it is our holding that the second statement, the one made to Marshall after the indictment, should not have been admitted.[6]

The parties hereto agree that the question whether petitioner's Federal constitutional rights were violated by the admission of this post-indictment statement turns altogether on a proper interpretation of the majority opinion (by Stewart, J.) in **Massiah v. United States,** 377 U. S. 201 (1964).[7]

The State of Tennessee contends, as the Tennessee Supreme Court held, that Massiah is restricted to a post-indictment statement obtained under such surreptitious circumstances as were present there. In particular, the State relies on this language in the majority opinion (377 U. S. at 207):

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[6] We should say, parenthetically, that we doubt that the first statement should have been ruled out under **Escobedo,** *supra,* as the trial judge thought it should be, since there was no showing that petitioner had requested and been denied counsel. Although **Miranda v. Arizona,** 386 U. S. 436 (1966), does not apply to this trial (**Johnson v. New Jersey,** 384 U. S. 719 (1966)), in determining whether the statement was free and voluntary, the meagerness of the warning should have been considered in the totality of circumstances. **Johnson v. New Jersey,** *supra,* at 730-1. In any event, since the first statement was stricken, it could hardly be said that the admission of the second statement, if error, was harmless error.

[7] As stated, **Miranda** does not apply to this trial, and it is clear that the statement was free and voluntary under the applicable standards.

> "All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."

If this be the correct interpretation, the involved statement was indeed admissible, since it is clear here (1) that Marshall did not seek out petitioner for a statement, (2) that petitioner knew Marshall was a police officer and was investigating the case, and (3) that the statement was made in the course of a casual conversation with the officer and with another present.

On the other hand, it is petitioner's contention that, under **Massiah**, any statement deliberately obtained from him after indictment by law enforcement officers or their agents without counsel present is inadmissible unless there was an express and understanding waiver of the right to have counsel present. If this be the correct interpretation of **Massiah**, the statement was inadmissible because (1) defendant was under indictment, (2) Marshall deliberately obtained the statement, and (3) petitioner at that time had no lawyer and did not so waive his right to have a lawyer present.

We conclude that petitioner's position is correct. In the first place, in the majority opinion in **Massiah**, it is also stated (377 U. S. at 206):

> "We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

Moreover, in his dissenting opinion in **Escobedo**, Justice White states (378 U. S. at 495):

> "In **Massiah v. United States**, 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. ..., the Court held that as of the date of the indictment the prosecution is disentitled to secure admissions from the accused."

See also: Justice Stewart's dissent in **Escobedo**, 378 U. S. at 493.

In **Lyles v. Beto**, 329 F. 2d 332 (5th Cir. 1964), Lyles, after his indictment and arrest for burglary, was questioned by police officers without counsel present. He made a confession that was admitted in evidence at his trial in a Texas criminal court. This confession, although made while in custody, was made under circumstances that, absent the prior indictment, would clearly have been admissible under the standards then applicable. The Court held that the confession was properly admitted. The Supreme Court, however, in a brief *per curiam* opinion, 379 U. S. 648 (1965), vacated the judgment and remanded for consideration in the light of **Massiah.** See also: **Queen v. United States**, 335 F. 2d 297 (D. C. Cir. 1964).

In **Beatty v. United States**, 377 F. 2d 181, 189 (5th Cir. 1967), the Court first quotes the language from **Massiah** relied upon by the State here and then proceeds to interpret this language:

> "In conclusion the court stated: '**All that we hold** is that the defendant's own incriminating statements, obtained by federal agents **under the circumstances here disclosed**, could not constitutionally be used by the prosecution as evidence against him at his trial' (Emphasis added).
>
> "We interpret this language as meaning that the exclusionary rule does not apply to all incriminating statements made under any circumstances by an accused after his indictment, but such rule only applies to those statements induced or deliberafely elicited

by officers or their agents from the accused after his indictment while he is without assistance of counsel. An examination of cases decided since **Massiah** supports this conclusion."

It results that petitioner must be discharged from custody within fifteen days following the entry of this Order, unless the State decides to try him again in which case he will be released to the Sheriff of Shelby County, Tennessee. It is so ordered.

This court desires to express its appreciation to G. Edward Draper of the Memphis bar, who, as a public defender, represented petitioner in the proceedings in the State courts and who, without pay, filed this habeas corpus application and represented petitioner at the hearing.

Enter this 2nd day of October, 1967.

Bailey Brown, Chief Judge.

APPENDIX "B".

(Filed November 7, 1968, Carl W. Reuss, Clerk.)

No. 18,338.

United States Court of Appeals
For the Sixth Circuit.

George Monroe Pryor,
Petitioner-Appellee,

vs.

C. Murray Henderson, Warden,
Tennessee State Penitentiary,
Respondent-Appellant.

On Appeal from the United States District Court for the Western District of Tennessee.

Decided November 7, 1968.

Before: Phillips, Edwards, and McCree, Circuit Judges.

Per Curiam. This is an appeal from a judgment granting a petition for habeas corpus and directing that petitioner-appellee be discharged from custody within fifteen days unless the state should decide to re-try him.

The opinion and order of the District Court states the relevant facts which we find to be supported by the evidence. Petitioner-Appellee, a twenty-eight year old male who had attended high school, was arrested in Memphis, Tennessee by the city police on January 18, 1964 and charged with rape of an eleven year old female. He was taken to the police station, where he was booked on a charge of criminal assault and confined in the city jail. The next day a city police officer advised petitioner that any statement he might make could be used against him

in court and asked whether he desired to make one. Petitioner declined to do so and no attempt at interrogation was made. On the following day appellee was taken before a city judge acting as a committing magistrate. The judge advised him of the charge, determined the existence of probable cause from the testimony of a police officer, set bail, and bound him over for action by the grand jury. Appellee was not called upon to plead and practice in all felony cases and there was no provision for appointment of counsel at this state and no inquiry was made with respect to a desire for counsel.[1] Four days later, petitioner was indicted for rape (TCA 39-3701-02).

On the following day, a city detective went to the apartment of petitioner's paramour, where the offense was alleged to have been committed, for the purpose of taking some photographs for use in the prosecution. As the detective was leaving, petitioner entered the apartment to visit his paramour and their child. Petitioner knew the detective (described by him as a friend-acquantance), knew that he was a city detective and assumed he was there to investigate the offense. A casual conversation ensued between petitioner and the detective in the presence of petitioner's paramour, and in the course of the discussion the detective asked, "George, what happened?" Petitioner replied, according to the detective, with an incriminating statement.

Counsel was appointed for petitioner eleven months later. In April, 1965, after reindictment under a different provision of the Tennessee Code which made unnecessary proof of force, petitioner was tried and convicted of hav-

[1] Our decision in this case leaves unimpaired the decision of this court in **Kimbro v. Herr**, 364 F. 2d 116 (6th Cir. 1966), **rev'd on other grounds**, 386 U. S. 128, 87 S. Ct. 902, 17 L. Ed. 2d 37 (1967). In that case, we held that there is no constitutional right to be represented by counsel at a preliminary hearing provided that a plea of not guilty is entered at the time and no incriminating statements are adduced.

ing carnal knowledge of a female under twelve years of age (TCA 39-3705). He was sentenced to life imprisonment and his motion for a new trial was denied, and the conviction was affirmed on appeal. **Pryor v. State**, 217 Tenn. 695, 400 S. W. 2d 700 (1966).

After exhausting available state remedies, petitioner filed a petition for habeas corpus, contending that his constitutional rights were violated by the admission into evidence of the incriminating statement elicited by the city detective. Following an evidentiary hearing, the District Court found that defendant was under indictment, that the detective deliberately obtained the statement, and that petitioner at that time had no lawyer and did not waive his right to have a lawyer present. Relying on **Massiah v. United States**, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), he held that petitioner's constitutional rights were violated by admission of the statement. His findings of fact are not clearly erroneous and we agree with his conclusion of law.

Mr. Justice Stewart, speaking for the majority in **Massiah**, cited with approval, the Supreme Court's language in **Powell v. Alabama**, 287 U. S. 45 (1932), where the Court noted that "... during perhaps the most critical period of the proceedings ... that is to say, from the time of his arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation (are) vitally important, the defendants ... (are) as much entitled to such aid (of counsel) during that period as at the trial itself." 377 U. S. at 205. He then stated that a petitioner is denied the basic protections of the guarantee of the assistance of counsel "when there (is) used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U. S. at 206.

The fact that counsel was not appointed for Pryor at the arraignment is not a *per se* violation of the Sixth Amendment. See **Kimbro v. Heer**, *supra*. However, **Massiah** makes it clear that the constitutional guarantee of counsel forbids the use of any incriminating statement deliberately obtained for the purpose of prosecution from a defendant who has not been advised of his right to remain silent and to the assistance of counsel, and has not clearly waived that right.

The State's contention that **Massiah** should be limited to circumstances where an incriminating statement is surreptitiously obtained is mistaken. In **Lyles v. Beto**, 379 U. S. 648, 85 S. Ct. 614, 13 L. Ed. 2d 552 (1965), the Supreme Court remanded for consideration in the light of Massiah a case of purposeful post-indictment interrogation of an unrepresented defendant who had not been advised of his right to counsel and had not waived that right. Cf. **U S. v. Hindmarsh**, 389 F. 2d 137 (6th Cir. 1968). Affirmed.